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# In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-410

COWLES COMMUNICATIONS, INC.,
*Petitioner,*

v.

JOSEPH L. ALIOTO,
*Respondent.*

## Petition for a Writ of Certiorari

**To the United States Court of Appeals for the Ninth Circuit**

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## Petition for a Writ of Certiorari

**To the United States Court of Appeals for the Ninth Circuit**

The petitioner, Cowles Communications, Inc., ("Cowles"), defendant in this First Amendment libel action, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit ("Court of Appeals") entered in this proceeding on June 23, 1975.

### OPINIONS AND ORDERS BELOW

The opinion of the Court of Appeals is reported in *Joseph L. Alioto v. Cowles Communications, Inc.*, (No. 73-1834) (9th Cir. June 23, 1975), and is reproduced as Appendix A.

The opinion and order of the United States District Court for the Northern District of California (Civil No. 52150) (N.D.Cal. February 2, 1973) is reproduced as Appendix B.

## JURISDICTION

The judgment of the Court of Appeals was rendered on June 23, 1975. This petition for a Writ of Certiorari is timely filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## QUESTIONS PRESENTED

1. Whether, in a First Amendment libel case, freedom of speech is unconstitutionally abridged when the Court of Appeals applies the "usual" rule of civil review to reverse a judgment for the publisher based upon the trial judge's independent examination of the whole record after two complete jury trials?

2. In determining state law, may a federal court sitting in diversity disregard a recent definitive judgment of the state's highest court and select the "better rule"?

3. Whether the Court of Appeals may relieve plaintiff of his constitutional obligation to establish the falsity of the article taken as a whole?

## CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision involved is the First Amendment to the United States Constitution:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

## STATEMENT OF THE CASE

This case arises out of the publication by Cowles of an article entitled "The Web that Links San Francisco's Mayor Alioto and the Mafia," and subtitled "A Look Report on the Private Joseph Alioto and His Relationships with Organized Crime" in the September 23, 1969 issue of *Look* Magazine. The article is reproduced as Appendix C. Plaintiff, the Mayor of San Francisco at the time of publication, filed this First Amendment libel action in the United States District Court for the Northern District of California on September 5, 1969, based upon diversity of citizenship and claiming general and punitive damages totalling $12,500,000.

After extensive discovery, the initial trial took place in April and May, 1970. After 13 days of trial and four days of jury deliberations the court declared a mistrial when the jury could not return a verdict.

After additional discovery, the second trial commenced September 25, 1972, consuming 22 court days. At the close of all the evidence, the court reserved its rulings on the parties' motions for directed verdict pending jury determination. Subsequently, the jury returned a special verdict, finding that the article was false in one or more particulars and defamatory; however, the jury could not, after three days, return a verdict on the question of actual malice. The court thereupon declared a mistrial. Defendant moved for judgment in accordance with defendant's motion for directed verdict based on the lack of substantial evidence clear and convincing in nature that defendant published with actual malice as defined by *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and its progeny. Defendant moved for judgment on the further ground that plaintiff had failed to comply with the applicable California retraction statute (California Civil Code, Section 48a) and was thereby limited to special damages, which plaintiff

neither pleaded nor proved. That statute provides that where a plaintiff fails to demand a retraction, he is limited to recovery of special damages only.

The court granted defendant's motion. In his opinion and order, the trial court judge held that in a First Amendment case the court exercises a larger role in reviewing the evidence than in the ordinary civil jury action. Weighing his own conviction after an independent review of the record and the failure of two juries to find to the contrary, the trial court judge decided that malice in the required sense was not shown with convincing clarity. On the retraction issue, the court noted that following the first trial, the California Supreme Court decided the case of *Briscoe v. Readers Digest Association* 4 Cal.3d 529; 483 P.2d 34 (1971) wherein that court squarely applied the California retraction statute to the publisher of a magazine notwithstanding the fact that the statute did not specifically refer to magazines. The trial judge also noted that the *Briscoe* decision was the latest expression of the highest state court on the matter. Although there were prior inconsistent decisions at the intermediate appellate level and the trial court judge was impressed with the reasoning of those decisions, he did not believe that he had the power to anticipate that the California Supreme Court would repudiate its 22 month old decision in *Briscoe* under the circumstances of this case.

The Court of Appeals reversed the trial court judge on both the actual malice and the retraction issues. On the malice issue, the Court of Appeals held that the trial court could only grant the defendant publisher's motion for judgment n.o.v. if, after giving the plaintiff all possible inferences and resolving all questions of credibility in plaintiff's favor, the evidence still failed to demonstrate clearly and convincingly that Cowles published with actual

malice. The trial court, although itself persuaded on the whole record otherwise, had concluded that a jury could reasonably find for plaintiff assuming certain inferences and credibility issues in plaintiff's favor. Accordingly, the Court of Appeals reversed, relying on its recent holding in *Guam Federation of Teachers, Local 1581 v. Ysrael,* 492 F.2d 438 (9th Cir.), *cert. denied,* 419 U.S. 872 (1974), wherein the Court of Appeals repudiated the decision in *Wasserman v. Time, Inc.,* 424 F.2d 920 (D.C. Cir.), *cert. denied,* 398 U.S. 940 (1970) requiring both the trial judge and the jury to find actual malice before a plaintiff's judgment could be sustained in a First Amendment libel action. In remanding, the Court of Appeals ordered a new trial confined to the sole issue of actual malice.

On the retraction issue the Court of Appeals reversed the trial court judge on the basis of *Montandon v. Triangle Publications, Inc.,* 45 Cal.App.3d 938 (1st Dist. 1975) wherein the state intermediate appellate court, in a decision rendered after the trial judge's ruling, declined to apply Section 48a to a defendant magazine publisher notwithstanding the California Supreme Court's decision in *Briscoe.*

## REASONS FOR GRANTING THE WRIT

**1. The decision of the court below is in direct conflict with the decisions of two other United States courts of appeals and conflicts in principle with the decisions of a third and fourth United States court of appeals as to the proper rule for review of the evidence in a First Amendment libel case.**

This Petition presents as an issue of first impression for this Court a significant aspect of the ongoing efforts to deal with the tension[1] necessarily existing between the need

1. The tension is heightened by the protracted character of the present six-year litigation between the parties. See Affidavit of Ronald S. Diana attached as Appendix D.

for a vigorous and uninhibited press and a legitimate interest in redressing wrongful injury.

In a First Amendment libel case, there must be an independent examination of the entire record to assure that a plaintiff's judgment does not constitute "a forbidden intrusion on the field of free expression." *New York Times Co., supra*, at 285. This examination is not precluded by the Seventh Amendment when a conclusion of law as to a federal right and a finding of fact are so intermingled as to make it necessary to analyze the facts in order to pass upon the federal question. This Court has "repeatedly recognized that the courts may not avoid an excursion into factfinding in this area simply because it is time consuming or difficult". *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 53 (1971). This Court has further declared that it "'has an obligation to test challenged judgments against the guarantees of the First and Fourteenth Amendments,' and in doing so 'this Court cannot avoid making an independent constitutional judgment on the facts of the case.'" [citation omitted]. *Rosenbloom, supra*, at 54. "The simple fact is that First Amendment questions of 'constitutional fact' compel this Court's *de novo* review". *Rosenbloom, supra*, at 54.

Acting on this language and backed by the respectable authority of several courts of appeals, the trial judge, after the second hung jury, made an objective examination of the whole record and concluded that malice in the required sense was not shown with convincing clarity. In accord with his concept of his duty to protect First Amendment rights and in accord with the directives of this Court referred to above, he entered judgment for the defendant publisher on January 30, 1973.

In doing so he was tripped up by a subsequent opinion of his court of appeals in *Guam Federation of Teachers,*

*Local 1581 v. Ysrael*, 492 F.2d 438 (9th Cir.), *cert. denied*, 419 U.S. 872 (1974), reversing a directed verdict for the defendant at the close of plaintiff's evidence. The reliance in *Ysrael* as in the opinion below was on the usual rule that the party against whom a motion for a directed verdict or a motion for a judgment notwithstanding the verdict is made is entitled to have the evidence viewed in the light most favorable to him and to all inferences that can properly be drawn in his favor by the trier of fact. The court condemned any attempt by either the trial judge or the appellate court to weigh credibility or to choose among legitimate inferences in a First Amendment libel case.

No one doubts the utility of the usual standard in the normal civil case where it is "no more serious in general for there to be an erroneous verdict in the defendant's favor than for there to be an erroneous verdict in the plaintiff's favor", but the court below fell into serious error in ignoring the remaining words of the above quotation: "In libel cases, however, we view an erroneous verdict for the plaintiff as most serious. * * * the possibility of such error * * * would create a strong impetus toward self-censorship which the First Amendment cannot tolerate." *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 53 (1971). While Justice Brennan was there speaking of the inutility of a negligence standard of liability to protect First Amendment values, the same considerations should apply to disqualify a rule which perforce must remain blind to the profound significance of erroneous verdicts for plaintiffs.

Aware of the Draconian nature of the usual rule and obedient to the principles first enunciated in *Sullivan*, Judge J. Skelly Wright with Judge Robinson concurring, in *Wasserman v. Time, Inc.*, 424 F.2d 920 (D.C. Cir), *cert.*

*denied*, 398 U.S. 940 (1970), set forth the two step rule quoted by the court below whereby both judge and jury must be satisfied after a full review of the facts including credibility questions that First Amendment rights have been preserved.

The Fifth Circuit promptly followed and quoted the two step rule in *Bon Air Hotel, Inc. v. Time, Inc.*, 426 F.2d 858, 864 (5th Cir., 1970). Their adherence to the rule that in First Amendment cases there must be an independent examination of the record is demonstrated by *Vandenburg v. Newsweek, Inc.*, 507 F.2d 1024, 1026-1027 (5th Cir. 1975).

Directly inapposite to the decision below is the opinion of the Eighth Circuit in *Baxter Berry v. National Broadcasting Company, Inc.*, 480 F.2d 428, 432 (8th Cir. 1973), where the court declared in setting aside verdict for plaintiff:

> "Ordinarily, we would resolve the question by examining the evidence in a light most favorable to the party having the verdict and overturn it only if the verdict were clearly erroneous. In First Amendment cases however, this Court must make an independent judgment as to whether the facts will support a verdict for the plaintiff without abridging the rights of freedom of speech and press as guaranteed by the First and Fourteenth Amendments. [*New York Times v. Sullivan, supra; Rosenbloom v. Metromedia*, 403 U.S. 29, 91 S.Ct. 1811, 29 L.Ed.2d 296.]

It appears that the governing rule in the Seventh Circuit would be in accord based upon the language of *Gertz v. Robert Welch, Inc.*, 471 F.2d 801 (7th Cir. 1972), *rev'd on other grounds* 418 U.S. 323 (1974). After stating "an appellate court has an independent obligation to make its own analysis of the record before a finding that a comment was reckless may be approved" the court concluded

that "Our examination of the record satisfies us that 'the proof presented to show actual malice lacks the convincing clarity which the constitutional standard demands. *Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81, 83". It is significant that in footnote 15 found on page 807 of the reported opinion together with the above quotations the court specifically noted "plaintiff did present evidence of malice (both the 'constitutional' and the 'ill-will' type)".

Turning the other cheek it is apparent that the Third Circuit has chosen to adopt the usual rule at least when reviewing (and reversing) summary judgment for the defendant. *Taggart v. Wadleigh-Maurice, Ltd.*, 489 F.2d 434, 439 (3rd Cir. 1973), *cert. denied*, 417 U.S. 937 (1974).

The Second Circuit joins the Third and Ninth in opposing the Fifth, Seventh, Eighth and District of Columbia Circuits, since in *Goldwater v. Ginzburg*, 414 F.2d 324, 337 (2nd Cir. 1969), *cert. denied*, 396 U.S. 1049 (1970) the court approved the action of the district court in viewing the evidence "in the light most favorable to the party opposing the motion" and denying defendant's motion for summary judgment.

**2. The clear conflict between the courts of appeals opposed four to three calls for the exercise of this Court's certiorari jurisdiction to bring about uniformity of decision in a sensitive area of constitutional freedoms.**

Inspection of the opinions cited above reveals square and irreconcilable conflict on an important and inevitably recurring issue of federal procedural law.

The court below setting its compass by the Seventh Amendment has twice denied any power on the part of the judiciary to weigh the evidence in order to protect First Amendment principles. In this it has been joined by two other courts of appeals.

With equal specificity the courts of appeals for the Fifth and District of Columbia circuits supported in principle by

decisions of the Seventh and Eighth take the opposite tack. In their view this Court's First Amendment decisions require trial and appellate judges to weigh the evidence and make independent judgment as to whether First Amendment rights have been abridged.

Nothing in the language by which the opposing circuits make their positions known furnishes any ground for belief that the conflict will be reconciled absent this Court's intervention. Indeed the depth of the split and the number of adversary courts forbids this conclusion.

This Court's concern for precise and uniform application of the law, both procedural and substantive in this area is amply demonstrated by the nineteen decisions handed down since *Sullivan* in 1964. Collateral to the issue of constitutional rights is this Court's opportunity to secure uniformity of application of the Rules of Federal Civil Procedure. See *Hanna v. Plumer*, 380 U.S. 460, 463 (1965).

### 3. The nonfinal character of the judgment below should not deter the Court.

Petitioner recognizes a special responsibility in petitioning the Court where the judgment below is nonfinal.

Given the importance of the question presented, the split of circuits discussed above, the Court is urged to recognize that the decisions below (Appendices A and B) limn the issues with unusual clarity. Thus, resolution of the first or second question presented could be accomplished on a very abbreviated record.

Disposition favorable to petitioner on either question would result in final resolution of this litigation, a result commending itself in this class of cases if the stultifying effect of protracted litigation tending toward self-censorship is to be avoided, *New York Times Co. v. Sullivan*, *supra* at 279.

Until the conflict between the circuits is resolved, uncertainty and uneven application of First Amendment protection seems inevitable. The sensitivity of the Court to this problem in the First Amendment area has been recently noted. See Justice Blackmun, concurring *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 354 (1974).

There is, of course, ample precedent for review of non-final judgments in First Amendment cases, *Time, Inc. v. Pape*, 401 U.S. 279 (1971), and cases dealing with the scope of jury trial, *Beacon Theatres v. Westover*, 359 U.S. 500 (1959).

**4. The Court of Appeals' failure to follow a recent decision of the highest state court directly controlling on a matter of state law is in conflict with this Court's decisions in Erie R. Co. v. Tompkins, 304 U.S. 64 (1938) and its progeny.**

Only absent a recent and controlling decision by the highest state court is a federal court permitted to sit as a state court and predict the holding the highest court of the state would apply. *Commissioner v. Bosch*, 387 U.S. 456, 465 (1967); *Bernhardt v. Polygraphic Co.*, 350 U.S. 198 204-205 (1955). In this case, the highest state court supplied the controlling rule of decision in *Briscoe v. Readers Digest Association*, 4 Cal.3d 529; 483 P.2d 34 (1971). The district court judge, applying *Erie* principles, concluded that *Briscoe* was controlling on the issue of whether the California retraction statute applied to magazines. That determination is entitled to great weight. *Owens v. White*, 380 F.2d 310, 315 (9th Cir. 1967) *American Timber & Trading Co. v. First Nat'l Bank of Oregon*, 511 F.2d 980, 983 (9th Cir. 1974).

The Court of Appeals' failure to follow and apply the holding of *Briscoe* is without precedent and raises serious and substantial questions regarding the continued vitality of the doctrine that federal courts must follow decisions of

the highest state court in diversity cases. A federal court simply cannot be free to psychoanalyze state court judges and anticipate a change in state law directly opposite from a recent decision of that highest state court on point.

**5. The Court of Appeals' failure to require plaintiff to sustain his constitutional burden to prove the falsity of the article taken as a whole calls for the exercise of this Court's power of supervision.**

Since this case involves a public official, the plaintiff is constitutionally required to prove the falsity of the subject article. *Cox Broadcasting Corporation v. Cohn,* —— U.S. ——, 43 L.Ed.2d 328, 346 (1975). Specifically, California tort law requires that proof of falsity be derived from the gist or sting of the article taken as a whole. *Handelsman v. San Francisco Chronicle,* 11 Cal.App.3d 381, 388, 389; 90 Cal.Rptr. 188 (1st Dist. 1970).

The gist of petitioner's article is set forth in the first nine lines which summarized the web of relationships linking the plaintiff with organized crime.

> "Mayor Joseph L. Alioto of San Francisco, the rising politician who came close to the Democratic nomination for the Vice Presidency in 1968, is enmeshed in a web of alliances with at least six leaders of La Cosa Nostra. He has provided them with bank loans, legal services, business counsel and opportunities, and the protective mantle of his respectability. In return, he has earned fees, profits, political support and campaign contributions." (Appendix C, ll. 1-9)

The balance of the text set forth with names, places and dates the nature and extent of the summarized relationships. As memorialized in the Pretrial order, plaintiff selected and placed into dispute from the 642 line article a total of 28 particulars, undertaking to establish the falsity of only those distinct portions of the article. In the jury instructions

each of those particulars (underscored in Appendix C) was read and submitted as a fact question on the issue of falsity. Neither the jury nor the trial court determined that the gist of the article taken as a whole was false. By its special verdict, the jury indicated only that the article was false "in one or more particulars" (Appendix B, p. 4).

The Court of Appeals transformed this limited and inconclusive response into a decision that the entire article was false, and sought to foreclose any further inquiry regarding the truth of the whole article by remanding the case for a partial new trial solely on the actual malice issue. (Appendix A, pp. 2, 8.)

In relieving plaintiff of his constitutional burden to prove the falsity of the article taken as a whole, the Court of Appeals violated petitioner's First Amendment right and deprived petitioner of substantial due process rights to a jury determination on this issue. The importance of the plaintiff's obligation to prove the falsity of the gist of the article taken as a whole can hardly be overstated since this issue is central to plaintiff's right to proceed to the issue of actual malice.

## CONCLUSION

For the reasons stated above, a Writ of Certiorari should issue to review and reverse the opinion and judgment of the Court of Appeals of the Ninth Circuit.

Respectfully submitted,

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September 14, 1975.

## *Appendix A*

*United States Court of Appeals for the Ninth Circuit*

Filed Jun 23 1975

No. 73-1834

Joseph L. Alioto
*Plaintiff-Appellant*

vs.

Cowles Communications, Inc.
*Defendant-Appellee*

OPINION

Appeal from the United States District Court
for the Northern District of California

Before: WRIGHT and CHOY, Circuit Judges, and EAST,* District Judge.

CHOY, Circuit Judge:

The September 23, 1969, issue of LOOK magazine contained an article entitled "The Web That Links San Francisco's Mayor Alioto and the Mafia: A LOOK report on the private Joseph Alioto and his relationships with organized crime." The article, written by two young employees of a San Francisco television station, accused Alioto of using his position as chairman of the board of a San Francisco bank to obtain loans for a trucking company run by James Fratianno, a convicted felon alleged to be a West Coast Mafia operative. The source of the information upon which this accusation was based was Fratianno's son-in-law, Tommy Thomas. Thomas claimed that Fratianno had told him of a number of meetings between Alioto and several

*The Honorable William G. East, Senior District Judge for the District of Oregon, sitting by designation.

underworld figures at the Nut Tree, a Bay Area restaurant. Thomas also claimed knowledge of connections between the Mafia and other prominant politicians. FBI and California law enforcement authorities were unable to corroborate the alleged meeting or other relationships between Alioto and the Mafia.

After agreeing to buy the article, LOOK editors had the authors interview Alioto. The authors asked Alioto about his connections with Fratianno, but did not tell him of their forthcoming Nut Tree accusations. When Alioto later learned that an article was to be published, he demanded, in a series of telegrams, a meeting with LOOK editors. LOOK officials replied that such a meeting would serve no useful purpose, since the story had already been sent to the printers.

Alioto responded by filing a libel suit in federal district court against LOOK's publisher, Cowles Communications, Inc. The first trial ended in a hung jury. On retrial, the jury returned a special verdict, finding that the article was false and that it was defamatory. The jury was unable to agree whether the article had been published with the requisite actual malice, however.

Despite this inconclusive verdict, the district judge awarded judgment to Cowles. He held that a finding of actual malice by both judge and jury was required in order for Alioto to recover, and that he found that actual malice "was not shown with convincing clarity." Therefore, he granted Cowles' motion for judgment n.o.v. Furthermore, he found that Alioto was entitled only to special damages because he had not complied with the requirements of Cal. Civ. Code § 48a by demanding a retraction within 20 days of publication; Alioto had demanded only general and punitive damages, so the judge granted Cowles' motion for summary judgment.

Alioto appeals. We reverse and remand for a new trial on the issue of actual malice.

*Retraction*

California permits a publisher or broadcaster to escape liability for general damages in a libel suit if he publishes or broadcasts a retraction upon proper demand:

> 1. In any action for damages for the publication of a libel in a newspaper, or of a slander by radio broadcast, plaintiff shall recover no more than special damages unless a correction be demanded and be not published or broadcast, as hereinafter provided. Plaintiff shall serve upon the publisher at the place of publication or broadcaster at the place of broadcast, a written notice specifying the statements claimed to be libelous and demanding that the same be corrected. Said notice and demand must be served within 20 days after knowledge of the publication or broadcast of the statements claimed to be libelous.

Cal.Civ.Code § 48a(1).

On its face, section 48a does not apply to magazines. One division of the California Court of Appeal has held explicitly that magazines are not covered by either the letter or the rationale of section 48a. *Morris v. National Federation of the Blind*, 192 Cal.App.2d 162, 13 Cal.Rptr. 336 (1961). Other divisions have applied section 48a to magazines without apparent notice that the statute specifies libels in newspapers, not all printed media. *Shumate v. Johnson Publishing Co.*, 139 Cal.App.2d 121, 293 P.2d 531 (1956); *Harris v. Curtis Publishing Co.*, 49 Cal.App.2d 340, 121 P.2d 761 (1942).

The California Supreme Court has added to the confusion in an opinion applying section 48a to the Reader's Digest. *Briscoe v. Reader's Digest Association*, 4 Cal.3d

529, 483 P.2d 34, 93 Cal. Rptr. 866 (1971). In two sentences near the end of a long opinion, the *Briscoe* court stated only that the plaintiff had not complied with the requirements of section 48a, and thus was limited to recovery of special damages. The court did not discuss the contrary decision in *Morris*, nor the fact that it was construing "newspaper" to include magazines.

In a case decided this year, a division of the Court of Appeal has refused to acknowledge *Briscoe* as requiring extension of 48a to publishers of magazines. *Montandon v. Triangle Publications, Inc.*, 45 Cal.App.3d 938, 120 Cal. Rptr. 186 (1975). The *Montandon* court carefully analyzed the judicial history of the issue, observing that *Morris* had been the only reasoned decision to date. The court observed that section 48a(3) requires that a retraction be published within three weeks of the demand. While publication within this time would have been possible for the weekly magazine involved in the *Montandon* litigation, the *Montandon* court was unwilling to adopt a construction of the statute which would require a distinction between weekly and biweekly magazines on the one hand and monthly magazines on the other. The court also emphasized the validity of the distinction made in *Morris* between newspapers and broadcast media, which are under pressure to disseminate "news while it is new," and magazines, which have the advantage of greater leisure in which to ascertain the truth of accusations before publishing them. Finally, in examining the legislative history of section 48a, the *Montandon* court observed that the statute originally applied only to newspapers, but had been amended in 1945 and again in 1949 to extend coverage to radio and then to television. The legislature had not seen fit, however, to amend the statute again in 1961 following

the *Morris* decision in order to extend coverage explicitly to magazines.

We find the reasoning presented by the *Montandon* opinion persuasive. The California Supreme Court has declined to review *Montandon*. Although this action does not of itself indicate approval of the *Montandon* decision, we conclude that if it were confronted with the issue it would decide that, notwithstanding its decision in *Briscoe*, section 48a's requirement of a demand for retraction does not extend to libels appearing in magazines. Therefore, we reverse the district court's judgment that Alioto's claim was limited to special damages and that, having claimed no special damages, he was entitled to no relief.

### *Actual Malice*

In order to recover damages for publication of libelous statements relating to official conduct, a public official must establish that the defendant published the falsehood with actual malice—"that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times Co. v. Sullivan*, 376 U.S. 254, 280, (1964). "Reckless disregard" does not refer to an objective "reasonable man" standard. The defendant must be proved to have subjectively "entertained serious doubts as to the truth of his publication." *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). To protect first amendment values, the Court requires a higher standard of proof than the usual "preponderance of the evidence"; the recklessness must be demonstrated by "clear and convincing proof." *See e.g., Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 30 (1971). Because of the importance of the interests in freedom of speech and press which are at stake, a court must review the facts to determine whether the jury applied the proper

standard; simply ascertaining that the jury was properly instructed does not suffice. *New York Times*, 376 U.S. at 285; *Rosenbloom*, 403 U.S. at 55.

In his opinion granting Cowles' motion for judgment n.o.v., the district judge stated that a jury could justifiably find that the evidence proved with convincing clarity that the libel was published either with or without actual malice. He then weighed for himself the persuasiveness of the evidence and the credibility of witnesses, took into account that Alioto had twice failed to convince a jury of Cowles' actual malice, and decided that Alioto had failed to establish actual malice.

The court thus implied that a plaintiff in a libel action must persuade two triers of fact: both judge and jury. Judge Skelly Wright has stated the proposition:

> [T]he trial court, at the close of the plaintiff's case must decide whether actual malice has been shown with 'convincing clarity.' In making this judgment the court will judge the credibility of the witnesses and draw its own inferences from the evidence. If the trial is permitted to proceed, the court will be called upon again to make a judgment on the actual malice issue at the close of all of the evidence. If the motion for a directed verdict at this stage of the trial is denied, the actual malice issue, along with the other issues, is then submitted to the jury under the *Times* instruction without any indication from the court or counsel that the court has decided that the evidence shows actual malice with 'convincing clarity.'
>
> This two-step procedure in which both the trial judge and the jury must find actual malice before there can be judgment for the plaintiff provides the protection of the First Amendment freedom that *Times* sought to make secure in areas of public concern".

*Wasserman v. Time, Inc.*, 424 F.2d 920, 922-923 (D.C. Cir.), *cert. denied*, 398 U.S. 940 (1970) (Wright, J., concurring); *see Bon Air Hotel, Inc. v. Time, Inc.*, 426 F.2d 858 (5th Cir. 1970).

Following the district court's decision, however, we repudiated Judge Wright's two-step approach in *Guam Federation of Teachers, Local 1581 v. Ysrael*, 492 F.2d 438 (9th Cir.), *cert. denied*, 419 U.S. 872 (1974). A district judge on motion for judgment n.o.v., or an appellate judge on review, must examine the evidence to see whether, if all permissible inferences were drawn in the plaintiff's favor and all questions of credibility were resolved in his behalf, the evidence then would demonstrate by clear and convincing proof that the libelous material was published with actual malice. Once this question has been resolved in the plaintiff's favor, the jury's findings as to those inferences and as to witness credibility are determinative.

The district court, while granting Cowles' motion for judgment n.o.v., found that:

> Judging the whole matter objectively on the whole record I think that a jury justifiably could find that the evidence showed with convincing clarity that the authors (and as of the date of publication their states of mind could be imputed to defendant) were ambitious young men, anxious to sell a sensational story to a national magazine; that the Tommy Thomas statements as to the Nut Tree meetings added greatly to the sensational nature and salability of the article; that the authors must have had doubts about the veracity of Tommy Thomas (the sole source of the Nut Tree statements); that they deliberately failed to cross-check on the validity of his statements because they did not want to find them to be untrue, and so published the statements with a reckless disregard for truth.

Our review of the record convinces us that the district judge fairly summarized the permissible inferences which a jury might draw from the evidence. Having found the evidence that LOOK's editors entertained doubts as to the truth of the Nut Tree allegations to be sufficiently clear and convincing in nature were the jury to decide questions of credibility and draw permissible inferences in Alioto's favor, the court was without power to award Cowles judgment notwithstanding the jury's failure to arrive at a verdict. The judgment must be reversed and the case remanded for a new trial on the sole issue of actual malice.

Reversed and Remanded.

## *Appendix B*

*In the United States District Court*
*for the Northern District of California*

Original Filed
Feb 2 1973

Civil No. 52150

Joseph L. Alioto,
*Plaintiff,*

vs.

Cowles Communications, Inc.,
*Defendant.*

### OPINION AND ORDER

Defendant's motion for judgment notwithstanding the verdict on the ground that there was insufficient evidence to prove malice is granted, and plaintiff's motion asking that the court determine that there was malice as a matter of law is denied.

Defendant's motion for summary judgment on the ground that plaintiff did not comply with Cal. Civ. Code § 48a (West 1954) and did not claim special damages is granted.

*On the issue of malice:*

Judging the whole matter objectively on the whole record I think that a jury justifiably could find that the evidence showed with convincing clarity that the authors (and as of the date of publication their states of mind could be imputed to defendant) were ambitious young men, anxious to sell a sensational story to a national magazine; that the Tommy Thomas statements as to the Nut Tree meetings added greatly to the sensational nature and salability of the article; that the authors must have had

doubts about the veracity of Tommy Thomas (the sole source of the Nut Tree statements); that they deliberately failed to cross-check on the validity of his statements because they did not want to find them to be untrue, and so published the statements with a reckless disregard for truth.

On the other hand, and again judging objectively, I believe that on the whole record a jury from the evidence reasonably could find that Carlson was telling the truth when he said "I listened to him (Thomas) tell me about a meeting or meetings that made perfect sense to me in light of all the other things I know about the people he said participated in those meetings."

Although I believe that the article is false in the statements as to the Nut Tree meetings[1] and places plaintiff in a false light in other statements, I find that malice in the required sense was not shown with convincing clarity. I do not attempt to detail all of my reasons for this conclusion because I do not believe that it would be helpful to the parties or to a reviewing court.[2] I do note, however, that I think there was an inherent honesty in the manner in which Carlson treated the notes of the Thomas interview. Handwritten notes were made at the time of the interview. These were later put in typewritten form and

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1. I have in mind the other evidence upon which plaintiff relies to establish malice such as the coloring of the language, the mutilation of the note books, and the prepublication communications between plaintiff and Gardiner Cowles, but it is my opinion that unless malice, in the sense of a knowledge that the statements were false or a reckless disregard of whether they were true or false, can be found with respect to the Nut Tree meetings then it cannot be found with convincing clarity.

2. My reaction is based upon the interplay of a myriad of factors including a subjective reaction to the various witnesses. Certainly any layman or any other judge might regard any factor and its interplay with any other factor differently than I do.

placed in the author's notebook. If it is to be said that some of the Thomas story was so incredible that Carlson had to disbelieve it and had Carlson had a purpose to deceive (either in anticipation of litigation or to sell the article) then I think that he would not, as he made the typewritten notes of the interview, have carried into them the material which makes Thomas appear incredible. After all, the ammunition with which the attack on Thomas is mounted comes from the Carlson notes, and had he put in them nothing more of the Thomas interview than appears in the article there would not be much of that ammunition.

This case has been twice tried. Able lawyers have twice explored and examined with a painful thoroughness the facts and inferences bearing upon the malice problem. The plaintiff has been publicly vindicated in that two judges and at least one jury have found that the article was false in one or more particulars, but the plaintiff has been unable to secure a favorable jury finding on the malice issue.

Weighing together my finding (entitled to a greater weight in this case than in the ordinary case[3]) and the failure of two juries to find to the contrary I have decided that a judgment for the defendant should be entered on the malice issue.

*On the Section 48a issue:*

Cal. Civ. Code § 48a (West 1954) provides in substance that the victim of a libel by newspaper or slander by radio broadcast may within 20 days after knowledge of publication give to the publisher written notice specifying the

3. In these first amendment cases a court does exercise a larger role in reviewing the evidence than it does in the ordinary jury action. *New York Times v. Sullivan*, 376 U.S. 254 (1964); *Wasserman v. Time, Inc.*, 424 F.2d 920, (D.C. Cir. 1970); *Bon Air Hotel, Inc. v. Time, Inc.*, 426 F.2d 858 (5th Cir. 1970).

statements claimed to be libelous and demanding a correction. If within three weeks following the notice there is not a sufficient retraction the victim may then sue in libel for general and exemplary damages; otherwise he is limited to special damages.

In this case plaintiff disavows any claim for special damages and a question arises whether he may claim general and exemplary damages. Prior to the time that the Look magazine in question was distributed plaintiff learned that an article about him was to appear in it. There was an exchange of telegrams between plaintiff and defendant. The main thrust of plaintiff's telegrams was that the article was libelous and that given a hearing by Look editors (as distinguished from Carlson and Brisson) plaintiff could demonstrate falsity. The magazine was dated September 23, 1969, but appeared on the newsstands on September 9, 1969. The action was filed on September 5, 1969.

There was no compliance with section 48a. There was no demand for correction.[4] (Plaintiff concedes this in a deposition.) Plaintiff did not wait for retraction before he filed the lawsuit and it is very questionable whether the telegrams sufficiently specified the statements claimed to be libelous.

Following the first trial of this case the California Supreme Court decided the case of *Briscoe v. Reader's Digest Ass'n*, 4 Cal.3d 529, 483 P.2d 34 (1971).[5] In that case the court examined the vulnerability of a complaint to a general demurrer and held that the complaint did not

4. The facts are remarkably similar to those in *Farr v. Bramblett*, 132 Cal.App.2d 36, 281 P.2d 372 (1955).

5. In a diversity action a federal court must follow changes in controlling state law which occur before the federal judgment becomes final. *Vandenbark v. Owens-Illinois Co.*, 311 U.S. 538 (1940).

state a cause of action on a false light theory. The court said at p. 44:

> We have previously stated that a "false light" cause of action "is in substance equivalent to * * * [a] libel claim, and should meet the same requirements of the libel claim * * * including proof of malice (cf. Time, Inc. v. Hill (1967) 385 U.S. 374, 87 S.Ct. 534, 17 L.Ed. 2d 456) and fulfillment of the requirements of section 48a [of the Civil Code]. (See Werner v. Times-Mirror Co., 193 Cal.App. 2d 111, 122-123, 14 Cal.Rptr. 208.)" (Kapellas v. Kofman, *supra*, 1 Cal. 3d 20, 35, fn. 16, 81 Cal.Rptr. 360, 459 P.2d 912.)
>
> Plaintiff here alleged malice, but at no time complied with the requirements of section 48a. It would therefore be possible for him to amend his complaint to state a cause of action based on a "false light" theory only if he alleged special damages.
>
> (Footnote omitted.)

This case has not been overruled.[6]

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6. I am aware that the decision does not even discuss the extension of the words "newspaper" or "radio broadcast" to magazines, does not discuss the problems of applying the three-week period for retraction to a monthly magazine and does not discuss the confused state of the prior California Court of Appeals decisions. *Harris v. Curtis Publishing Co.*, 49 Cal.App.2d 340, 121 P.2d 761 (1942); *Shumate v. Johnson Publishing Co.*, 139 Cal.App.2d 121, 293 P.2d 531 (1956); *Morris v. National Federation of the Blind*, 13 Cal.Rptr. 336, 192 Cal.App.2d 162 (1961). It was agreed by the parties that the question of the applicability of section 48a to a magazine was not raised by the parties or discussed in the briefs and that no petition for rehearing was filed asking the court to reconsider. I am impressed by the reasoning of *Morris v. National Federation of the Blind*, *supra*, and feel that were the problem directly submitted to the California Supreme Court there is a substantial possibility that *Briscoe v. Reader's Digest Ass'n*, 4 Cal.3d 529, 483 P.2d 34 (1971), would be repudiated. Despite all of this I do not believe that I have the power to anticipate that repudiation under the circumstances here. *See* the opinions in *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198 (1956).

It is urged that the decision in *Briscoe v. Reader's Digest Ass'n, supra,* should not be applied retroactively. In California the usual practice is to give court decisions a retroactive effect. *County of Los Angeles v. Faus,* 48 Cal. 2d 672, 312 P.2d 680 (1957), *Connor v. Great Western Savings and Loan Ass'n,* 69 Cal.2d 850, 447 P.2d 609 (1968). There are exceptions to the rule but in view of the fact that the California Supreme Court had not spoken and that the state of the California law, as revealed by the appellate court decisions, was confused, I do not think that this case falls within any of the exceptions.

IT IS THEREFORE ORDERED that the plaintiff be denied all relief. Each party shall bear its own costs.

DATED this 30th day of January, 1973.

/s/ Russell E. Smith
Russell E. Smith
*United States District Judge*

## *Appendix D*

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*In the United States District Court*
*for the Northern District of California*

NO. 52150

Joseph L. Alioto
*Plaintiff,*

vs.

Cowles Communications, Inc.
*Defendant.*

Judge Russell E. Smith

### *AFFIDAVIT*

RONALD S. DIANA, having been duly sworn, upon his oath, deposes and says:

I am now house counsel for Cowles Communications, Inc., publisher of LOOK magazine. During 1960 to 1965, I was associated with the law firm of Lord, Day & Lord,

counsel to the New York Times, and participated from the trial through the proceedings in the Supreme Court of the United States in the case of *New York Times v. Sullivan.* I am a member of the State and Federal Bars of New York and New Jersey and admitted to practice in the Supreme Court of the United States.

Since the inception of the instant litigation, I have acted on behalf of the defendant Cowles Communications, Inc. in conjunction with our trial counsel Charles W. Kenady, Esquire, of Messrs. Cooper, White & Cooper. The facts set forth herein are based on my personal knowledge.

This affidavit is filed to document the expense incurred by the defendant in conjunction with the instant litigation and the deterrent effect the incurred expenses have had upon the editorial policies of LOOK magazine.

Since the inception of this action, defendant has been required to spend more than $75,000 in out-of-pocket expenses. This does not include payment for the more than 6,000 hours of legal services which the defendant has paid its trial counsel through the end of June 1971. None of this expense is covered by insurance. The amount of money expended by the defendant to date in the defense of this action nearly equals the amount of money known to your affiant to have been expended by the New York Times in the defense of the *Sullivan* case through and including the ultimate reversal of the jury verdict in *Sullivan* by the Supreme Court of the United States.

In October 1969, subsequent to the start of this lawsuit in September 1969, the editors of LOOK magazine received a story proposal relating details of an alliance between certain members of organized crime and legitimate business in the eastern United States. By March of 1970, the story had been researched and the manuscript given legal

approval for publication in LOOK magazine. As a direct result of the expenses which were then being incurred by the defendant in the defense of the instant action, the editors of LOOK magazine were advised by defendant's management through your affiant that the story could only be published if the editor was willing to set aside, out of his editorial budget, at least $50,000 as a legal defense fund. To the editor, this meant that those funds would have to be maintained in reserve until such time as the article has been published and the statute of limitations had passed. As a result, of course, the funds would not be able to have been used by him in the acquisition of other literary properties for publication in LOOK. For that reason, and only for that reason, the editor of LOOK reluctantly concluded that he would be unable to publish the manuscript described above.

Affiant can further state of his own personal knowledge that on numerous occasions during the pendency of this litigation, he has, in the course of his professional duties, been forced to advise the editors of LOOK magazine that the publication of proposed articles calling into question the qualifications of public officials would, as in the instance above, expose LOOK magazine to the non-recoverable expenditure of substantial sums in the successful defense of libel actions which such publication might well provoke; that upon receipt of such advice, the editors have passed over such articles in favor of less controversial subject matter.

That by reason of the above, your affiant firmly believes that as a direct consequence of the expense of this litigation, the editorial freedom of the editors of LOOK magazine has been substantially restricted; that, by example, other publishers have also avoided controversial subject matter

as a precaution against exposure to equivalent financial losses; and that the free flow of information to the American public on matters of public concern has been materially abridged.

RONALD S. DIANA

.....

Ronald S. Diana

Subscribed and sworn to before
me this 11th day of August,
1971.

.....[SEAL]

DORIS I. MARTIN

Notary Public